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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

Nos. 711 and 721

BENJAMIN F. JOHNSON, *Petitioner*

v.

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM, *Petitioner*

v.

MANHATTAN RAILWAY COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of Respondent Central Hanover Bank and Trust Company, as Trustee Under Consolidated Mortgage of Manhattan Railway Company

EDWARD CORNELL

Counsel for Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company

H. C. McCOLLOM

Of Counsel

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Statement.

The general facts adequately appear in the briefs submitted by the other respondents. However, certain facts relating particularly to the position of the respondent Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, should be stated herein in order to show its interest that, by affirmance of the decision below, finality be imposed upon the attacks which have been made on the jurisdiction in the Interborough and Manhattan receivership cases.

In the brief of the petitioner Johnson, it is several times stated (pp. 2, 13, 56, 59, 69) that all of the parties in the *Brake Shoe* suit are parties defendant in the *Johnson* suit. Such is not the fact. This respondent was a party to the *Brake Shoe* suit by its intervention allowed therein on September 19, 1932; but it was never a party in the *Johnson* suit begun on September 21, 1933—except for the asserted effect of the erroneous order consolidating the *Brake Shoe* suit with the *Johnson* suit.

The District Court made three orders which are mentioned in the briefs of the other parties. Two of these orders were made in the *Johnson* suit to which this Trustee was not a party. The third order, called the "Consolidation Order," was made not only in the *Johnson* suit but also in the *Brake Shoe* suit to which this Trustee was a party. From the third order this respondent appealed to the Circuit Court of Appeals. It did not appeal from the other two orders, made in the suit to which it was not a party.

By its brief in this Court the petitioner Johnson asserts (pp. 68-71) that the Circuit Court of Appeals was in error in setting aside the Consolidation Order. It is very doubt-

ful whether this question is before the Court inasmuch as Johnson did not assign error in this respect. If such question is before the Court, this Trustee is a respondent in respect thereof.

This respondent is the Trustee under the Consolidated Mortgage (which is the first mortgage) of Manhattan Railway Company, dated February 26, 1890, securing $40,683,000 in principal amount of bonds. There is no dispute that default exists under said mortgage, in that taxes due in November, 1932, amounting to upwards of $780,600, have not been paid (the interest instalment of April 1, 1933, amounting to $813,660, being also in default); and that said default is a presently actionable event of default under said mortgage.

In the *Brake Shoe* suit this Trustee, after its intervention and on September 28, 1932, filed its bill of complaint by which it asked for the impounding of the income from the mortgaged property, and it asserts that by the filing of said bill the said income was impounded as of said filing date. On October 3, 1932, it filed in said suit its petition asking that the income from the mortgaged property be segregated and held in a separate account, so that Manhattan income should not be used for general Interborough purposes. Many proceedings have been had in the *Brake Shoe* suit affecting this Trustee and the bondholders secured by its mortgage.

This respondent, therefore, has an interest that the confusion shall be avoided which would result from sustaining the collateral attack made herein upon the jurisdiction.

ARGUMENT.

I.

The Circuit Court of Appeals properly reversed the so-called Consolidation Order; and inasmuch as, without the consolidation attempted by such order, the *Johnson* suit was manifestly a collateral attack upon *de facto* action in the *Brake Shoe* suit, the proper reversal of the Consolidation Order fully justified the decision of the Circuit Court of Appeals.

By the Consolidation Order the *Johnson* suit and the *Brake Shoe* suit purported to be consolidated "into one cause." In Judge WOOLSEY's opinion it is stated that the purpose of such consolidation was to avoid the "residuum of doubt" which would exist so long as the *Johnson* suit and the *Brake Shoe* suit should remain separate causes.

We believe that more than a doubt existed whether the Court in the *Johnson* suit could set aside the orders made in the *Brake Shoe* suit. In fact it is perfectly certain that, whatever may be the merits of the main controversy, Johnson's suit was a collateral attack upon action which this respondent and the other intervenors in the *Brake Shoe* suit were entitled to treat as the action of a *de facto* judge.

We believe that the merits of the main controversy as to whether Judge MANTON acted *de jure* have never been involved in this case.

This respondent had nothing to do with the institution of the Interborough receivership. When the Interborough receivers were appointed they took possession not only of the Interborough properties but also of the Man-

hattan leased properties which constituted the security for its mortgage. Upon application of Manhattan, the receivership was extended to the Manhattan properties, although such properties have remained in the possession of the Interborough receivers. The appointment of the Interborough receivers disclosed to this respondent that Interborough had permitted large defaults to occur and continue in respect of taxes upon the Manhattan leased properties, which defaults constituted actionable events of default under this respondent's mortgage. To protect its interests, it intervened in the Interborough suit. Shortly after its intervention the Interborough Receivers defaulted in the payment of the interest due October 1, 1932, from Interborough, under the Manhattan lease, upon the Consolidated Mortgage Bonds; and in connection with such defaults and other matters, it has taken such proceedings in the *Brake Shoe* suit as have appeared advisable for the protection of its bondholders.

Johnson and all other possible objectors were given full opportunity to be heard on September 22, 1932, which was the return day of the order to show cause why the Interborough and Manhattan receiverships should not be made permanent. He did not appear. Judge MANTON, under two designations, was a District Judge, and, having first appointed temporary receivers, later appointed them, without objection, as permanent receivers. Any argument that his action was not *de facto* is baseless; and it is equally clear that for Johnson to attack the *Brake Shoe* proceedings by an entirely different suit, with different parties, was a collateral attack.

It is also certain that the difficulty could not be cured, as the District Court attempted, by making the two causes "into one cause" or, as it has been otherwise

expressed, by throwing the two causes into "hotchpot". After consolidation, the two causes still remain separate and distinct.

Dismissal of the Johnson bill, as a collateral attack on *de facto* action, could only have been avoided by such an unauthorized consolidation as the District Court had in mind. The decision of the Circuit Court of Appeals in reversing the Consolidation Order was clearly correct, not only because the situation was an improper one for any consolidation, but also because the expressed reason for the consolidation was to give to Johnson a standing in the *Brake Shoe* suit which could not be given to him in any such way.

II.

The decision of the Circuit Court of Appeals should be affirmed.

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

EDWARD CORNELL
Counsel for Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company.

H. C. MCCOLLOM,
Of Counsel.